Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:MAN:TL-N-4816-99
PLDarcy

date:

to: Territory Manager Robert Skiba
Attn: Mr. Lawrence Paduano

from: District Counsel, Manhattan

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subject: [redacted]

Tax Years Ended November [redacted], [redacted], November [redacted], [redacted], November [redacted], [redacted], November [redacted], [redacted] and November [redacted], [redacted]

Determination of the Tax Matters Partner

Uniform Issue List # 6231.07-00

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This memorandum responds to your request for additional advice on determining who is the tax matters partner ("TMP") of [redacted] ("Partnership"), a Delaware limited partnership subject to the uniform partnership audit procedures, I.R.C. § 6221 et. seq. The advice rendered in this memorandum is conditioned on the accuracy of the facts presented to us. This advice is subject to National Office review. We will contact you within two weeks of the date of this memorandum to discuss the National Office's comments, if any, about this advice.

ISSUES:

1. Who is the TMP of the Partnership for the taxable years ended November [redacted], [redacted], November [redacted], [redacted], November [redacted], [redacted], November [redacted], [redacted] and November [redacted], [redacted]?

2. If there is no TMP of the Partnership for the taxable years ended November [redacted], [redacted], November [redacted], [redacted], November [redacted], [redacted], November [redacted], [redacted] and November [redacted], [redacted], can the Internal Revenue Service nevertheless obtain consents to extend the statute of limitations?

FACTS:

THE ADVICE IS RENDERED ON THE BASIS THAT ALL THE REPRESENTATIONS AND FACTS IN THIS MEMORANDUM ARE CORRECT. WE RECOMMEND THAT YOU VERIFY THIS INFORMATION. IF ANY OF THE REPRESENTATIONS AND/OR FACTS ARE INCORRECT OR CANNOT BE SUBSTANTIATED, WE MAY NEED TO MODIFY OUR ADVICE.

I. INTRODUCTION

The Examination Division is currently auditing the taxable years ended November [redacted], [redacted] through November [redacted], [redacted] of the Partnership, a Delaware limited partnership subject to the uniform partnership audit procedures. § 6221 et. seq. The parties seek to extend the statute of limitations on assessment for these periods. You have requested our advice to assist you to identify the TMP of the Partnership for the purposes of obtaining an extension of the statute of limitations on assessment. In memoranda dated August 11, 1999 and September 1, 1999, we advised you that we would defend your designation of [redacted], an indirect partner of the Partnership, as the TMP of the Partnership for the taxable year ended November [redacted], [redacted].[1] However, we expressed our view that it was risky to designate [redacted] as TMP.

In a memorandum dated November [redacted], the Partnership's counsel, [redacted], urged the Internal Revenue Service to consider [redacted] ("[redacted]") the TMP for the taxable years ended November [redacted], [redacted], November [redacted], [redacted], November [redacted], [redacted], November [redacted], [redacted] and November [redacted], [redacted]. We disagree with the Partnership's conclusions.

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[1] You advised us that you also designated [redacted] as TMP of the Partnership for the taxable year ended November [redacted].

On February 15, 2000, we provided you with written advice in this case; however, you subsequently uncovered new facts that potentially impacted the advice, therefore, with the concurrence of your office and the National Office, we withdrew the advice. You have subsequently clarified the facts and you asked us to provide advice on whether, if the Partnership has no TMP, can the Internal Revenue Service obtain consents to extend the statute of limitations for the taxable years ended November [redacted], [redacted], November [redacted], [redacted], November [redacted], [redacted], November [redacted], [redacted] and November [redacted], [redacted].

To assist you in responding to the Partnership's counsel, we have attached the body of a proposed letter that you can provide to them explaining the position of the Internal Revenue Service in this matter. This letter is limited to the issue concerning who is the TMP of the Partnership for the taxable years ended November [redacted], [redacted], November [redacted], [redacted], November [redacted], [redacted], November [redacted], [redacted] and November [redacted], [redacted].

II. The Partnership Structure

A. Tax Years Ended [redacted] Through [redacted]

The Partnership is a Delaware limited partnership. Between [redacted] and [redacted], the Partnership had only two partners, [redacted] ("[redacted]") and [redacted] ("[redacted]"). [redacted] was a [redacted] percent general partner of the Partnership, and [redacted] was a [redacted] percent limited partner of the Partnership. [redacted] was a Delaware corporation. On its Federal partnership information returns, Forms 1065, for these periods, the Partnership designated [redacted] as its TMP. [redacted], in her capacity as an officer of [redacted], executed all tax related documents on behalf of [redacted].

[redacted] was formed in [redacted] and, during the years at issue, was a Delaware limited partnership subject to the uniform partnership audit procedures. For the taxable years ended November [redacted], [redacted], November [redacted], [redacted] and November [redacted], [redacted], [redacted] had [redacted] individual general partners. On its Forms 1065 for the taxable years ended November [redacted], [redacted], November [redacted], [redacted] and November [redacted], [redacted], [redacted] designated [redacted], in her personal capacity, as the TMP. During [redacted], [redacted] became [redacted]'s sole general partner. At this time, [redacted] and the other general partners became limited partners of [redacted].

B. November [redacted], [redacted] through [redacted]

On [redacted], the first day of the [redacted] taxable year, [redacted] contributed its [redacted] percent limited partnership interest in the Partnership to [redacted] ("[redacted]"), a Delaware limited partnership. Thus, under Delaware state law, [redacted] became the new [redacted] percent limited partner of the Partnership. [redacted] had a [redacted] percent limited partnership interest in [redacted]. [redacted] had a [redacted] percent general partnership interest in [redacted]. [redacted] is a Delaware limited liability company that, for the period between [redacted], [redacted] and [redacted], was treated as a partnership for Federal tax purposes.[2] The Partnership states that [redacted] was the TMP of [redacted] for this period.

Also on [redacted], [redacted] merged into [redacted] ("[redacted]") pursuant to a statutory merger. [redacted] is the surviving entity, and [redacted] has ceased to exist. [redacted] is a Delaware limited liability company owned [redacted] percent by [redacted]. Thus, between November [redacted], [redacted] and [redacted], [redacted] had a [redacted] percent limited partnership interest in the Partnership, and [redacted] had a [redacted] percent general partnership interest in the Partnership.

For the taxable year ended [redacted], [redacted] treated both the Partnership and [redacted] as its "branches" for Federal income tax purposes. The Examination Division has determined that [redacted] has a single owner and, therefore, is considered a disregarded entity pursuant to Treas. Reg. § 301.7701-3(b)(1)(ii). Although the Partnership remained a limited partnership under state law, it ceased to be a partnership for Federal tax purposes. [redacted] made an election pursuant to Treas. Reg. § 301.7701-3(c) to treat the Partnership as a disregarded entity by filing a Form 8832 effective [redacted]. This memorandum does not address [redacted]'s treatment of the Partnership and [redacted] for Federal income tax purposes.

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[2] For the period [redacted], [redacted] through [redacted], [redacted] was a [redacted] percent partner of [redacted], and [redacted], a Delaware Limited liability company, was a [redacted] percent partner of [redacted].

C. [redacted] To The Present

On [redacted], all the interests of [redacted], including its [redacted] percent limited partnership interest in [redacted], were transferred to [redacted] terminated under § 708(b)(1)(A) and merged into [redacted] under Delaware state law. Thus, [redacted] replaced [redacted] as the [redacted] percent limited partner of [redacted]. The Partnership states that [redacted] will remain [redacted] TMP for tax periods subsequent to [redacted]. [redacted] and [redacted] still remain the partners of the Partnership for state law purposes. However, [redacted] will continue to treat [redacted] and the Partnership as branches for Federal income tax purposes. Prior to [redacted], the Partnership never attempted to designate a new TMP pursuant to Treas. Reg. § 301.6231(a)(7)-1.

DISCUSSION:

Section 6501 provides the general rule for respondent to assess a deficiency within three years from the filing of a Federal income tax return. A taxpayer may consent in writing to an additional period during which assessment may be made. § 6501(c)(4). The period for assessing any income tax attributable to partnership items (or affected items) for a partnership taxable year will not expire before three years after a partnership files its Form 1065. § 6229(a). That period may be extended by agreement at any time during the initial three year period following the partnership's filing of its return. § 6229(b)(1). The period may be extended with respect to all partners by an agreement entered into by the Secretary and, either the TMP or "any other person authorized by the partnership in writing to enter into such an agreement." § 6229(b)(1)(B). See also § 6501(n)(2)(providing period to assess partnership items can be extended as provided for under the provisions of § 6229).

I. THE PARTNERSHIP CURRENTLY HAS NO TMP FOR THE TAXABLE YEARS ENDED NOVEMBER [redacted], [redacted], NOVEMBER [redacted], [redacted] AND NOVEMBER [redacted], [redacted][3]

On its Forms 1065 for the taxable years ended November [redacted], [redacted], November [redacted], [redacted], November [redacted], [redacted], November [redacted], [redacted] and November [redacted], [redacted], the Partnership designated [redacted] as its TMP. On [redacted], [redacted], [redacted]. merged into [redacted] pursuant to a statutory merger and ceased to exist as an entity. Pursuant to Treas. Reg. § 301.6231(a)(7)-1(l)(iii), this statutory merger and dissolution terminated [redacted]'s status as the Partnership's TMP. The Internal Revenue Service uniformly considers a statutory merger as a dissolution or liquidation. Thus, the [redacted], [redacted] statutory merger, whereby [redacted] merged into [redacted], terminated the TMP status of [redacted].

The Partnership appears to argue that [redacted], as [redacted] TMP, automatically succeeded [redacted] as the Partnership's TMP when [redacted] became the Partnership's [redacted] percent limited partner on [redacted]. We find no support in the Internal Revenue Code or Treasury Regulations to support the proposition that the TMP of a new limited partner can automatically become the new TMP of the first tier partnership. Thus, as a result of [redacted]'s merger into [redacted], the Partnership lost its TMP.

II. THE PARTNERSHIP CANNOT DESIGNATE A TMP

Pursuant to § 6231(a)(7)(A) the Partnership can only designate a general partner as provided in regulations as its TMP. Pursuant to Treas. Reg. § 301.6231(a)(7)-1(a) a partnership may designate a partner as its TMP only as provided for in Treas. Reg. § 301.6231(a)(7)-1. However, none of the subsections of that Regulation will permit the Partnership to appoint a new TMP at this time.

Treas. Reg. § 301.6231(a)(7)-1(d) permits a current TMP to certify that a new TMP has been properly selected by the Partnership. However, since the Partnership has no TMP, Treas. Reg. § 301.6231(a)(7)-1(d) does not apply. Treas. Reg. § 301.6231(a)(7)-1(e) would permit the majority of general partners

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[3] As previously stated, we will defend your designation of [redacted], an indirect partner of the Partnership, as the TMP of the Partnership for the taxable years ended November [redacted], [redacted] and November [redacted], [redacted].

of the Partnership at the close of the taxable years ended November [redacted], [redacted], November [redacted], [redacted], November [redacted], [redacted], November [redacted], [redacted] and November [redacted], [redacted], to designate a new TMP. However, [redacted], the sole general partner of the Partnership, no longer exists. Therefore, the Partnership cannot rely on Treas. Reg. § 301.6231(a)(7)-1(e) to designate a new TMP.

For similar reasons the Partnership cannot rely on Treas. Reg. §§ 301.6231(a)(7)-1(f) or 301.6231(a)(7)-1(m) to designate a TMP. Treas. Reg. § 301.6231(a)(7)-1(f) permits the partners with a majority interest in a partnership to designate a new TMP when the general partner is no longer a partner in the partnership. Treas. Reg. § 301.6231(a)(7)-1(f)(1)(iv). However, any such designation must be made by "persons who were partners at the close of such taxable year and were shown on the return for that year to hold more than 50 percent of the aggregate interest in partnership profits held by all partners as of the close of such taxable year." Treas. Reg. § 301.6231(a)(7)-1(f)(2)(iv). Since none of the Partnership's partners for the taxable years ended November [redacted], [redacted], November [redacted], [redacted], November [redacted], [redacted], November [redacted], [redacted] and November [redacted], [redacted] exist, Treas. Reg. § 301.6231(a)(7)-1(f) does not apply.

Treas. Reg. § 301.6231(a)(7)-1(m) automatically designates as TMP the general partner having the largest profits interest in the partnership at the close of the taxable year when the status of the current TMP terminates pursuant to Treas. Reg. § 301.6231(a)(7)-1(l)(iii), and the partnership does not designate a new TMP. However, Treas. Reg. § 301.6231(a)(7)-1(m) cannot apply because [redacted], the sole general partner for the taxable years ended November [redacted], [redacted], November [redacted], [redacted], November [redacted], [redacted], November [redacted], [redacted] and November [redacted], [redacted], no longer exists.

In summary, the Partnership did not designate a new TMP prior to the time [redacted] merged into [redacted] pursuant to a statutory merger. At this point, the Partnership cannot designate a new TMP under any of the subsections of Treas. Reg. § 301.6231(a)(7)-1(a). Thus, there is no means that would currently permit the Partnership to designate a TMP.

III. THE INTERNAL REVENUE SERVICE PROPERLY DESIGNATED [redacted] AS TMP

(b)(7)a, (b)(5)(AC)

(b)(7)a, (b)(5)(AC)

(b)(7)a, (b)(5)(AC)

(b)(7)a, (b)(5)(AC)

(b)(7)a, (b)(5)(AC) .

Section 6231(a)(7) defines a TMP as follows:

(A) the general partner designated as the tax matters partner as provided in regulations, or

(B) if there is no general partner who has been so designated, the general partner having the largest profits interest in the partnership at the close of the taxable year involved (or, where there is more than 1 such partner, the 1 of such partners whose name would appear first in an alphabetical listing).

If there is no general partner designated under subparagraph (A) and the Secretary determines that it is impracticable to apply subparagraph (B), the partner selected by the Secretary shall be treated as the TMP. (Emphasis added).

Obviously, in this case where no partner exists both §§ 6231(a)(7)(A) and (B) become impracticable to apply and the IRS must rely, if possible, on the flush language of § 6231(a)(7) to designate a TMP. The difficult question is when § 6231(a)(7)(A) does not apply and § 6231(a)(7)(B) is "impracticable to apply", may the IRS select an "indirect partner" as a TMP under the catchall provision of the last sentence of § 6231(a)(7). A "partner" is defined, inter alia, as "a partner in the partnership" and "any other person whose income tax liability under subtitle A is determined in whole or part by taking into account directly or indirectly partnership items of the partnership." § 6231(a)(2). Any partner of [redacted] for the tax years at issue has its income tax liability indirectly determined by how the IRS treats the Partnership's tax items (i.e., they are arguably partners of the Partnership pursuant to § 6231(a)(2)(B)). Thus, as a Partner of [redacted], [redacted] was a partner of the Partnership.

In PAE Enterpises v. Commisioner, T.C. Memo. 1988-222, the United States Tax Court hinted, but did not conclude, that the Internal Revenue Service may designate an "indirect partner" such as one of the partners of [redacted]. The dicta in PAE Enterpises finds some support in the Treasury Regulations on who may act as TMP. Specifically, pursuant to § 6231(a)(2) a partner of [redacted] was a partner of the Partnership, and Treas. Reg. § 301.6231(a)(7)-1(q)(1) does not appear to limit the Internal Revenue Service's designation to a "general partner."

(b)(7)a, (b)(5)(AC)

(b)(7)a, (b)(5)(AC)

(b)(7)a, (b)(5)(AC)

However, if you chose to designate an indirect partner as TMP, Treas. Reg. § 301.6231(a)(7)-1(q)(2) sets forth the following criteria the Internal Revenue Service should consider in making such designation:

(i) The general knowledge of the partner in tax matters and the administrative operation of the partnership.

(ii) The partner's access to the books and records of the partnership.

(iii) The profits interest held by the partner.

(iv) The views of the partners having a majority interest in the partnership regarding the selection.

(v) Whether the partner is a partner of the partnership at the time the tax-matters-partner selection is made.

(vi) Whether the partner is a United States person (within the meaning of section 7701(a)(30)).

Since the Internal Revenue Service designated [redacted] as TMP for the taxable years ended November [redacted], [redacted] and November [redacted], [redacted], our proposed letter will address the Partnership's view that [redacted] was a partner of the Partnership, and the Partnership's failure to consider the statutory definition of the term partner in § 6231(a)(2).

IV. THE INTERNAL REVENUE SERVICE CAN ENTER INTO CONSENT WITH FORMER PARTNERS OF THE PARTNERSHIP

Between [redacted] and [redacted], the Partnership had only two direct partners, [redacted] and [redacted]. A partner may individually enter into an agreement to extend the statute of limitations on assessment of partnership items and affected items with the Secretary. § 6229(b)(1)(A).

A. [redacted]

Since [redacted] is a flow through entity, it does not have a Federal income tax liability. Any tax adjustments stemming from the audit of the Partnership will not be assessed against [redacted]. Rather, any assessments resulting from adjustments to the Partnership will be made against the [redacted] former partners of [redacted]. Since no assessment of income tax will ever be made against [redacted], any agreement to extend the statute of limitations on assessment entered into by [redacted] and the Internal Revenue Service pursuant to § 6229(b)(1)(A) will have no legal effect. The individual and corporate partners of [redacted] are partners of the Partnership. § 6231(a)(2). Thus, we believe that the IRS can only enter an effective agreement to extend the statute of limitations on assessment of the Partnership's partnership items and affected items pursuant to § 6229(b)(1)(A) with partners of [redacted].

You have expressed doubt about our conclusion and asked us to consider that provisions of § 6229(f). Section 6229(f)(1) provides a statute of limitations for assessing partnership items that become nonpartnership items by reason of one or more of the events described in § 6231(b). Section 6229(f)(2) provides a special rule concerning the statute of limitations when a partner and the IRS enter into a partial settlement agreement. In this case, the sole issue is how the IRS and the Partnership (or it partners) can extend the statute of limitations on the assessment of the Partnership's partnership items and affected items. Thus, § 6629(f) has no bearing on the issue at hand.

B. [redacted]

On [redacted], [redacted] merged into [redacted] pursuant to a statutory merger. [redacted] is the surviving entity, and [redacted] has ceased to exist as an entity. As the surviving entity in the merger, [redacted] has the authority to execute any consent on behalf of [redacted]. 6 Del. C. § 18-209(g). Thus, if you seek to obtain a consent to extend the statute of limitations at the "partner level" on behalf of [redacted], that caption of the Form 872 should read as follows:

"[redacted] (E.I.N. **-*******), as successor in interest to [redacted] (E.I.N. **-*******)"

Pursuant to Section 18-402, the management of a Delaware limited liability company is vested in the members owning more than 50 percent of the limited liability company. However, section 18-402 permits a limited liability company agreement to vest management authority in a delegated manager. Thus, if you seek to obtain a consent to extend the statute of limitations at the "partner level" on behalf of [redacted], you must obtain the current version of [redacted]'s limited liability company agreement to determine who may execute any consent.

Since there are [redacted] partners of [redacted], you have indicated that it is too cumbersome to obtain consents pursuant to § 6229(b)(1)(A). However, if you choose to obtain partner level consents, we will gladly provide advice on which individual may execute any such consent on behalf of [redacted].

IV. THE PARTNERSHIP DID NOT AUTHORIZE A PERSON OTHER THAN THE TMP TO EXTEND THE STATUTE OF LIMITATIONS

Section 6229(b)(1)(B) also allows the IRS to enter into a written consent to extend the statute of limitations with respect to the assessment of partnership items with a person other than the TMP who is authorized in writing by the partnership. § 6229(b)(1)(B). Procedures for a partnership to authorize a person other than the TMP to enter into an agreement extending the period of limitations are set forth in Treas. Reg. § 301.6229(b)-1T, which provides as follows:

> Extension by agreement. -- Any partnership may authorize any person to extend the period described in section 6229(a) with respect to all partners by filing a statement to that effect with the service center with which the partnership return is filed. The statement shall --
>
> (a) Provide that it is an authorization for a person other than the tax matters partner to extend the assessment period with respect to all partners,
>
> (b) Identify the partnership and the person being authorized by name, address, and taxpayer identification number,
>
> (c) Specify the partnership taxable year or years for which the authorization is effective, and

(d) Be signed by all persons who were general partners at any time during the year or years for which the authorization is effective.

In this case, the specific procedures of Treas. Reg. § 301.6229(b)-1T have not been met. However, in Cambridge Research and Development Group, 97 T.C. 287 (1991), the Tax Court held that a written partnership agreement can satisfy the requirement of § 6229(b)(1)(B) that authorization to extend the period of limitations must be manifested in writing. Unfortunately, the Partnership's partnership agreement does not permit the current partners of the Partnership to bind the former partners. While the Partnership's partnership agreement sets forth powers of the "partners," the agreement specifically states that former partners are not "partners." Thus, neither [redacted] nor [redacted] can execute a Form 872-P pursuant § 6229(b)(1)(B) for the taxable years ended November [redacted], [redacted] through November [redacted], [redacted].

V. CONCLUSION

We will defend your designation of [redacted], an indirect partner of the Partnership, as the TMP of the Partnership for the taxable years ended November [redacted], [redacted] and November [redacted], [redacted]. For the taxable years ended November [redacted], [redacted], November [redacted], [redacted] and November [redacted], [redacted], the Partnership cannot designate a new TMP under any of the subsections of Treas. Reg. § 301.6231(a)(7)-1(a). However, the IRS can enter into an agreements to extend the statute of limitations pursuant to § 6229(b)(1)(A) with the individual and corporate partners of [redacted] and [redacted], as successor in interest to [redacted].

[redacted]
(b)(7)a, (b)(5)(AC)
[redacted]
(b)(7)a, (b)(5)(AC)
[redacted]
(b)(7)a, (b)(5)(AC)
[redacted].

VI. GENERAL MATTERS

As a final matter, we recommend that you pay strict attention to the rules set forth in the IRM. Specifically, IRM

4541.1(2) requires use of Letter 907(DO) to solicit the extension, and IRM 4541.1(8) requires use of Letter 929(DO) to return the signed extension to the taxpayer. Dated copies of both letters should be retained in the case file as directed. When the signed extension is received from the taxpayer, the responsible manager should promptly sign and date it in accordance with Treas. Reg. § 301.6501(c)-1(d) and IRM 4541.5(2). The manager must also update the statute of limitations in the continuous case management statute control file and properly annotate Form 895 or equivalent. See IRM 4531.2 and 4534. This includes Form 5348. In the event an extension becomes separated from the file or lost, these other documents would become invaluable to establish the agreement.

Furthermore, please note that Section 3461 of the Restructuring and Reform Act of 1998, codified in § 6501(c)(4)(B), requires Internal Revenue Service to advise taxpayers of their right to refuse to extend the statute of limitations on assessment, or in the alternative to limit an extension to particular issues or for specific periods of time, each time that the Internal Revenue Service requests that the taxpayer extend the limitations period. To satisfy this requirement, you may provide Pub. 1035, "Extending the Tax Assessment Period," to the taxpayer when you solicit the statute extension. Alternatively, you may advise the taxpayer orally or in some other written form of the § 6501(c)(4)(B) requirement. In any event, you should document your actions in this regard in the case file.

Should you have any questions regarding this matter, please contact Paul Darcy at (212) 264-5473 extension 256.

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